Supreme Court, U.S.
FILED

09-700 DEC 14 2009

OFFICE OF THE CLERK

No. 09-____

IN THE
# Supreme Court of the United States

HOMAIDAN AL-TURKI,
*Petitioner,*

v.

COLORADO,
*Respondent.*

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Pursuant to the Due Process Clause and the Sixth Amendment's guarantee of an impartial jury, a trial court must allow probing of a potential juror at *voir dire* for possible bias when there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976); *accord Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973). In this case, petitioner, an Arab Muslim who faced an ethnically and religiously infused prosecution on charges punishable by life in prison, sought to probe the views of a juror who stated during *voir dire* that he was "more likely to believe" a Muslim would commit a crime and that, "notwithstanding the facts presented, . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a.

The question presented is whether the courts below erred in refusing to allow petitioner to probe the juror for potential bias (or to dismiss the juror for cause) on the ground that the juror's comments "did not unequivocally express actual bias." App. 16a.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT ..... 2

REASONS FOR GRANTING THE WRIT ..... 10

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### CASES

*Aldridge v. United States*,
283 U.S. 308 (1931) ..... 11, 18

*Carrillo v. People*,
974 P.2d 478 (Colo. 1999) ..... 8, 9, 16, 17

*Dennis v. United States*, 339 U.S. 162 (1950) ..... 10

*Dye v. Hofbauer*, 546 U.S. 1 (2005) ..... 16

*Fisher v. State*, 481 So.2d 203 (Miss. 1985) ..... 17

*Ham v. South Carolina*,
409 U.S. 524 (1973) ..... passim

*Maryland v. Dyson*, 527 U.S. 465 (1999) ..... 15

*People v. Wilson*
114 P.3d 19 (Colo. App. 2004) ..... 16

*Ristaino v. Ross*, 424 U.S. 589 (1976) ..... passim

*Rosales-Lopez v. United States*,
451 U.S. 182 (1981) ..... 10, 12, 18

*Turner v. Murray*, 476 U.S. 28 (1986) ..... i, 13

*Wainwright v. Witt*, 469 U.S. 412 (1985) ..... 17

### CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... 9

U.S. Const. amend. VI ..... i, 1, 9, 10

U.S. Const. amend. XIV ..... 1, 9, 14

**STATUTE**

28 U.S.C. § 1257(a) ..... 1

**OTHER AUTHORITIES**

1 The New Shorter Oxford English Dictionary 223 (1993) ..... 15

Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143 (2003) ..... 17

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Homaidan Al-Turki respectfully petitions for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

## OPINIONS BELOW

The Colorado Court of Appeals' opinion, App. 1a, is unreported, although the decision is noted at 2009 WL 147006. The order of the Colorado Supreme Court denying review of that decision, App. 30a, is unreported, although it can be found at 2009 WL 2916999.

## JURISDICTION

The Colorado Supreme Court denied review in this case on September 14, 2009. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial [] by an impartial jury of the State and district wherein the crime shall have been committed."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## STATEMENT

This case presents an important issue involving the right of a criminal defendant to obtain the benefit of trial by an impartial jury.

1. Petitioner Homaidan Al-Turki is a Saudi Arabian citizen who moved to the United States in 1995. He settled near Denver, and, until the prosecution at issue here, was pursuing a Ph.D in linguistics at the University of Colorado. He lived with his wife and five children, two of whom are U.S. citizens. Petitioner also opened and operated a bookstore that sold Islamic texts and merchandise.

Unbeknownst to petitioner, the federal government began closely monitoring him in 2001 or 2002, based on his national origin and traditional Muslim beliefs. This surveillance lasted for years, but the federal government never charged him with any crime. As part of this surveillance, however, the federal government learned that petitioner had a live-in housekeeper from Indonesia, Z.A., and that her work visa was expired. On November 19, 2004, federal officials arrested and jailed Z.A. on immigration violations. These violations gave the federal government the power to deport her.

Over the course of five months, federal agents repeatedly interrogated Z.A., seeking to uncover evidence that petitioner was involved in some kind of wrongdoing. During over a dozen consecutive interviews (with FBI agents, counselors, and an Indonesian consular official who spoke with Z.A. in her native language), Z.A. denied being aware of any

malfeasance and told federal authorities that petitioner's family treated her well. Among other things, federal agents repeatedly asked Z.A. if petitioner had sexually assaulted her, and she repeatedly said no.

On April 7, 2005, however, Z.A. alleged for the first time that she had been sexually abused by petitioner for the previous four years. She also claimed that petitioner had refused to pay her for much of the work she performed. The next day, she signed an application for U.S. work authorization. The government granted the application shortly thereafter, allowing her to avoid deportation and stay and work in the United States.

2. The State of Colorado charged petitioner with twelve counts of aggravated sexual assault; kidnapping; conspiracy to commit first-degree kidnapping; criminal extortion; and false imprisonment. Petitioner maintained his complete innocence, and the case proceeded to trial.

A pool of 106 potential jurors was selected for the case. Even though the parties' positions made clear at the outset that ethnically and culturally sensitive issues would be threaded throughout the case, the trial judge tightly restricted *voir dire*. After distributing a basic jury questionnaire that informed the jurors that the defendant and the victim in the case were "Muslims from the Middle East and Indonesia," App. 20a, the judge described the charges to the venire members and told them that petitioner "says he did not commit these crimes." Tr. 2582. The judge then posed the generic question to all 106

venire members simultaneously whether they could be "fair and impartial" in the case. The trial court deemed all of the jurors who failed to say anything as qualified to serve. The parties were then given 45 minutes to question the jury pool and to exercise their peremptory challenges.

Twelve people were selected to serve on the jury. As the court began to swear in the jury, one of the twelve, Juror C.M., interrupted the proceedings to ask a question:

> Before I take this oath, can I ask one question that I didn't address previously because I was under the impression that it really wouldn't matter. But with respect to the religious issue that has come to light in this, it appears what comes to light in what would be this trial, if I'm more likely to believe a person of faith would commit a crime if it conflicted – if the faith conflicted with the laws of our government. It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion?

App. 13a. The trial court responded by telling Juror C.M. in simple terms that he had a duty to base his decision on the evidence and applicable legal principles. Juror C.M. nonetheless persisted:

> What I say, *notwithstanding the facts presented,* if it came to a situation where it was a he said, she said issue, *my bias may be*

> *altered based on the belief he would be obeying religion versus law.*

App. 14a (emphasis added). After the trial court repeated its previous boilerplate admonition, Juror C.M. tried a third time to ascertain whether his predisposition was legally disqualifying:

> I guess at this time I may have some issue with that religion based on my belief that it is fundamentally my belief the laws of this country – and I'm concerned that I don't know – *I guess I'm presenting you what I may or may not have a bias going into this case*, and I'm – *I just don't know if that would be considered bias* or that would be considered factually consistent with religion that may be at hand here.

Tr. 2756, quoted in part at App. 14a (emphasis added).

At this point, petitioner requested leave to question Juror C.M. further about his views toward Islamic religion. The trial court denied that request. Petitioner then asked that the court excuse the juror for cause. The trial court denied that request too. Because petitioner had used all of his peremptory challenges, Juror C.M. then was seated, over defense objection, on the jury without any further questioning.

As indicated during pretrial proceedings, the prosecution sought to prove its allegations at trial by constant reference to Islamic culture and supposed Muslim practices. In opening statements, the

prosecution cast petitioner's requirement that Z.A. dress in traditional Muslim attire while in his house as indicative of his guilt. For example, the prosecution argued that the Muslim requirement that Z.A. cover her face made her "invisible" as a person, put her in "isolation," and, indeed, made her an "invisible prisoner." Tr. 2792. The prosecution explained to the jury "the People are asking you . . . to make her visible again." Tr. 2803.

The prosecution did not introduce any physical or forensic evidence to support its allegations. Nor did it offer any eye or ear witnesses testimony concerning its sexual assault allegations from anyone other than Z.A. Instead, it rested on Z.A.'s statements, and it introduced evidence concerning purported Muslim culture to explain why Z.A. never accused petitioner of any wrongdoing during the years the acts were supposedly committed. For instance, the prosecution brought a mannequin dressed in Muslim women's clothing into court to show the jury how petitioner required Z.A. to dress. It also questioned Z.A. extensively on the restrictive nature of such clothing. What is more, the prosecution called an expert witness in "Islamic and Muslim culture" and "women's issues." Explaining to the jury that her opinions derived in part from familiarity with the family of Osama bin Laden, the witness harshly critiqued Islam's general treatment of women. She claimed, for example, that "[i]n Islamic jurisprudence" in Saudi Arabia, women are "punished" for reporting sexual assault through "house arrest" or "honor killing." Tr. 3441-42. A rape, the witness added, could be "corrected" by having the victim marry the perpetrator. Tr. 3441.

The prosecution pushed these anti-Islamic themes still further in closing argument. It suggested that petitioner had been living in the United States long enough to "know[] the rules here," and that he had transgressed some norm that live-in housekeepers "aren't told what to wear." Tr. 2115. The prosecution further claimed that petitioner was "holding [Z.A.] captive," Tr. 2118, and required her to perform "extra assignments" such as entertaining during "Ramadan." Tr. 2121. The prosecution even referred to the September 11 terrorist attacks, arguing that Z.A. was so isolated that she did not even know about those events until considerably after they occurred. Tr. 4219-20.

The defense claimed in closing that Z.A. had lied to the federal agents, after months of prodding, to avoid deportation and objected that the "premise" of the whole prosecution was really "Islamophobia." Tr. 2137. "You're being asked," the defense suggested to the jury, "to select the deeply held beliefs of Mr. Al-Turki and his family and indeed those belonging to about a billion people on the planet, one of the world's great religions, and selectively take those instead of evidence instead of [proof] and say that they intended to use practices and to make this woman invisible, to subjugate her, to imprison her." Tr. 2137. The defense urged the jury not to give into "fear" concerning "cultural issues" and to acquit for the lack of "hard evidence" indicating that petitioner had committed any crimes. Tr. 2137-38.

The jury acquitted petitioner of the kidnapping charges. It also acquitted him of the aggravated sexual assault charges. But it convicted him of

twelve counts of the lesser included offense of unlawful sexual contact. It also convicted him of false imprisonment, conspiracy to commit false imprisonment, and criminal extortion. The trial court sentenced him to the maximum term of twenty-eight years to life in prison.

3. Petitioner appealed, arguing among other things that the trial court's limitations on *voir dire* – especially its refusal to allow questioning of C.M. – "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20 (opening paragraph of argument). After developing that claim in his brief, petitioner further contended that the trial court "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury. *See Ham v. South Carolina*, 409 U.S. 524, 527 (1973) (due process requires that defendant be permitted to question prospective jurors about potential race bias in cases where facts raise racial issues)." Deft's C.A. Br. 40.

The Colorado Court of Appeals rejected this argument and affirmed. It did not dispute that ethnically and religiously charged contentions were at the core of petitioner's case. But the court of appeals reasoned that petitioner was not entitled to question Juror C.M. about those issues because "Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion." App. 16a. The court of appeals supported that holding by citing to *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further

questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488.

4. Petitioner sought discretionary review in the Colorado Supreme Court. In the first paragraph of his argument, he contended: "The trial court's refusal to permit further questioning or, alternatively, excuse the juror for cause violated Mr. Al-Turki's constitutional rights to due process and to a fair and impartial jury. U.S. Const. amends. V, VI, XIV." Deft's Pet'n for Cert. 6. The State opposed review, asserting that "it is clear that by stating that Juror C.M. 'did not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. 9.

The Colorado Supreme Court denied review, with one justice stating that he would have granted review to address two of petitioner's claims, including his claim regarding *voir dire*. App. 30a-31a.

5. This petition follows.

## REASONS FOR GRANTING THE WRIT

This Court repeatedly has made clear that a trial court must allow a defendant in a criminal case to probe prospective jurors for bias whenever there is a "significant likelihood" that racial or similarly invidious prejudice might infect the juror's deliberations. Here, at the outset of an ethnically and religiously infused prosecution, petitioner sought to question a potential juror who interrupted the taking of his oath to say he was biased against Muslims. The trial court, however, rejected this request for questioning, and the Colorado Court of Appeals affirmed, holding that the juror's comments "did not unequivocally express actual bias." App. 16a. This decision, which follows others in Colorado, so clearly and consequentially departs from the Constitution's "significant likelihood" standard as to require this Court's intervention.

1. Although the Constitution generally leaves *voir dire* to the sound discretion of trial judges, "[t]here are . . . constitutional requirements with respect to questioning prospective jurors about racial or ethnic bias." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). Specifically, "[p]reservation of the opportunity to prove actual bias is a guarantee of the defendant's [Sixth Amendment] right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950); *accord Ristaino v. Ross*, 424 U.S. 589, 597 (1976). The Due Process Clause's guarantee of "essential fairness" likewise requires courts to provide defendants with an adequate opportunity to ferret out invidious bias during *voir dire*. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *see also*

*Aldridge v. United States*, 283 U.S. 308, 314-15 (1931) (equating "religious prejudices" with racial and ethnic bias in this respect). Without an adequate opportunity to probe for bias, a defendant cannot effectively use his peremptory challenges, and trial courts cannot intelligently rule on motions to strike jurors for cause.

In a series of cases, this Court has established a clear standard for resolving disputes in this respect. This first such case is *Ham*. There, the State of South Carolina charged a black man "known locally" for his work in civil rights activities with a drug crime. 409 U.S. at 525. The accused's "basic defense at the trial was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge." *Id.* The trial court, however, refused to allow the defendant to ask the prospective jurors whether they might be biased or prejudiced against African Americans. The state supreme court upheld this decision.

In an opinion by then-Justice Rehnquist, this Court unanimously reversed. This Court reasoned that "under the facts shown by this record," the Constitution required the trial court to allow the defendant "to have the jurors interrogated on the issue of racial bias." *Id.* at 527. As this Court later explained at greater length, the *Ham* decision "reflected an assessment of whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would be not as 'indifferent as [they stand] unsworne.'" *Ristaino*, 424

U.S. at 596 (emphasis added) (quoting Coke on Littleton 155b (19th ed. 1832)). When "[r]acial issues . . . [a]re inextricably bound up with the conduct of the trial," it is likely to "intensify any prejudice that individual members of the jury might harbor" and it becomes necessary to allow questioning of potential jurors "to meet the constitutional requirement that an impartial jury be impaneled." *Id.* at 597.

Not all, or even many, disputes over the scope of *voir dire* in racially or ethnically charged cases end up triggering a constitutional dispute. This Court, as a matter of its supervisory authority over federal courts, requires federal district courts to allow probing for bias whenever there is a "reasonable possibility" that invidious prejudice might influence the jury. *Rosales-Lopez*, 451 U.S. at 182. Many state court systems, following guidelines established by the American Bar Association, similarly allow such probing as a matter of state law or allow challenges for cause whenever there is a "reasonable doubt that the juror can be fair and impartial." ABA Principles for Jury Trials, Principle 11.C.3 (adopted 2005).

But in cases following *Ham*, this Court has steadfastly insisted on the "significant likelihood" of bias test as a constitutional floor, demanding that trial courts allow questioning of potential jurors whenever it is satisfied. *See Ristaino*, 424 U.S. at 598 (rejecting constitutional claim of inadequate *voir dire* because "[t]he circumstances thus did not suggest a *significant likelihood* that racial prejudice might infect Ross' trial") (emphasis added); *Rosales-Lopez*, 451 U.S. at 190 ("[W]hen there are more

*substantial indications of the likelihood* of racial or ethnic prejudice affecting the jurors in a particular case" than the races of the defendant and the victim, "the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount[s] to an unconstitutional abuse of discretion.") (emphasis added); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (plurality opinion) ("The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally *significant likelihood* that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworne.") (emphasis added and internal quotation omitted).

2. The Colorado Court of Appeals in this case improperly ignored the constitutional "significant likelihood" test. Just like the defendant in *Ham*, petitioner stood trial as a member of a persecuted minority, who was locally known for his ethno-political views (in petitioner's case, by way of his bookstore). *See supra* at 2, 5-7 (detailing the facts of the prosecution). Just like the defendant in *Ham*, petitioner defended himself on the ground that the State was prosecuting him on the basis of his ethno-political beliefs and activities. Petitioner argued at trial that the prosecution was propounding ethnic prejudices ("Islamophobia") in place of actual evidence of guilt. *See supra* at 7. Just like in *Ham*, therefore, "[r]acial issues . . . were inextricably bound up with the conduct of the trial." *Ristaino*, 424 U.S. at 597.

Indeed, there is more cause for concern here than in *Ham*, for the prosecution itself injected ethnicity

into the case by arguing that petitioner's Islamic practices subjugated the alleged victim and explained why she had failed to accuse him of any wrongdoing until arrested and faced with deportation. The prosecution even called an expert witness in Muslim culture and Islam's general treatment of women. Worse yet, one juror here, Juror C.M., actually acknowledged his bias right before being sworn in. The potential juror suggested that based on his assumptions about Muslims, he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The potential juror also told the trial court that "notwithstanding the facts presented . . . my bias may be altered based on the belief [that petitioner] would be obeying religion versus law." App. 14a. Yet even then, the trial court refused to allow petitioner to question the juror for potential bias (and also refused to strike the juror for cause).

Petitioner clearly and unambiguously argued on appeal, citing *Ham*, that the trial court's refusal to allow such questioning "denied Mr. Al-Turki his rights to a fair trial by an impartial jury and due process under the Sixth and Fourteenth Amendments to the U.S. Constitution." Deft's C.A. Br. 20; *see also* Deft's C.A. Br. 40 ("The trial court's" restrictions on *voir dire* "violat[ed] Mr. Al-Turki's rights to due process and a fair trial by an impartial jury."). But the Colorado Court of Appeals rejected this argument, on the ground that the juror's comments "did not *unequivocally express actual bias* against the defendant or his religion." App. 16a (emphasis added).

Even if this characterization of the juror's comments as less than an "unequivocal" expression of bias were accurate (itself a highly contestable point[1]), the Colorado Court of Appeals decided this case on the basis of the wrong standard. A defendant need not show that a potential juror is "unequivocally" ethnically or religiously biased against him in order to be permitted to probe that juror's views. Rather, the Constitution requires a trial court to allow such probing whenever there is a "significant likelihood" of prejudice. *E.g., Ristaino*, 424 U.S. at 598. The facts surrounding this prosecution and petitioner's defense alone met that standard, and Juror C.M.'s comments erased any doubt that at least questioning of that juror was necessary.

3. The stark incompatibility between the Colorado Court of Appeals' decision and this Court's precedent may suggest that summary reversal is more appropriate than a full review on the merits. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (summarily reversing state intermediate court decision in criminal case that used wrong test to resolve federal constitutional claim). But for three

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[1] The definition of bias is a "predisposition" to believe that members of an ethnic group are more likely to engage in certain *behavior. 1 The New Shorter Oxford English Dictionary 223* (1993). That is exactly how Juror C.M. described his views; he said he would be "more likely to believe a person of [Islamic] faith would commit a crime if conflicted – if the faith conflicted with the laws of our government." App. 13a. The only thing about which Juror C.M. was less than clear, since he was not a lawyer, was whether he believed his predisposition against Muslims rendered him legally unable to be a fair and impartial juror in the case.

reasons, it is critical that this Court take some kind of action here.

First, the integrity of the federal Constitution and this Court's decisions is at stake. Abiding by the etiquette of federalism, petitioner challenged the trial court's refusal to allow questioning of the potentially biased juror primarily on state-law grounds. But there can be no doubt that petitioner also fairly raised a federal constitutional objection to the trial court's actions in the Colorado Court of Appeals and the Colorado Supreme Court. *See supra* 8-9. Now that the Colorado courts have declined to afford relief on state-law grounds and have refused to follow the federal Constitution's minimum requirements in this area, it is incumbent on this Court to ensure that *some* court apply the proper federal standard to petitioner's obviously meritorious claim. *See Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam) (summarily reversing when defendant fairly raised federal claim but lower courts ignored it).

Second, the decision below shows that Colorado courts are apparently unwilling to follow the federal "significant likelihood" standard. In rejecting petitioner's claim, the Colorado Court of Appeals cited *Carrillo v. People*, 974 P.2d 478 (Colo. 1999), in which the Colorado Supreme Court held that a trial court need not allow further questioning of a juror unless the juror "articulate[s] a clear expression of bias." *Id.* at 488. Other Colorado appellate decisions are in accord. *See, e.g., People v. Wilson* 114 P.3d 19, 25 (Colo. App. 2004) (requiring "unequivocal[]" showing of bias). Thus, as the State put it in this case: "[I]t is clear that by stating that Juror C.M. 'did

not unequivocally express actual bias,' the court of appeals meant exactly what [the Colorado Supreme] Court meant in stating in *Carrillo* that the challenged juror did not 'articulate a clear expression of bias requiring his dismissal.'" State's Opp. to Cert. in Colo. S. Ct. 9 (quoting *Carrillo*). The court of appeals apparently perceived the law in Colorado as so settled that it was unnecessary to publish this opinion. It is time for this Court to step in.

Third, Colorado's substitution of an "unequivocal express[ion of] actual bias" standard for the Constitution's "significant likelihood" causes real harms. Most immediately, it harms defendants. In the context of death-qualifying jurors, this Court has observed: "What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). This is particularly so in the context of ethnic prejudice. As "empirical findings" have demonstrated, "the average potential juror will be extremely reluctant to disclose his biases" at all, much less in unambiguous terms. *Fisher v. State*, 481 So.2d 203, 220 (Miss. 1985). Indeed, "[s]ome prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial." Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 Chi.-Kent L. Rev. 1143, 1150 (2003). The Constitution's "significant likelihood" standard deals in probabilities instead of certainties in order to account for such realities.

The State's impossibly high hurdle for probing potential jurors for invidious bias also impairs the public's perception of the criminal justice system. This Court has explained:

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*

*Rosales-Lopez*, 451 U.S. at 191 (plurality opinion) (quoting *Aldridge*, 283 U.S. at 314-15) (emphasis added). This Court should reaffirm that our Constitution does not tolerate ethnic or religious prejudices of any kind to infect our jury boxes.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 2009

# APPENDIX

# APPENDIX A

## COLORADO COURT OF APPEALS

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Court of Appeals No.: 06CA2104
Arapahoe County District Court No. 05CR1571
Honorable Justin M. Hannen, Judge

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The PEOPLE of the State of Colorado,
Plaintiff-Appellee,

v.

Homaidan AL-TURKI,
Defendant-Appellant.

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JUDGMENTS AFFIRMED

Division VI
Opinion by Judge HAWTHORNE.
TERRY and MÁRQUEZ*, JJ., concur.

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced: January 22, 2009

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

We affirm the judgments of conviction entered against defendant, Homaidan Al-Turki, on jury verdicts finding him guilty of false imprisonment, conspiracy to commit false imprisonment, criminal extortion, theft, and twelve counts of unlawful sexual contact.

## I. CONCLUSIONS

A. The evidence before the jury was sufficient to support the jury's findings that defendant was guilty of theft and unlawful sexual contact.

B. The trial court did not err in denying three of defendant's challenges for cause because the three prospective jurors did not evince actual bias toward defendant.

C. The trial court did not abuse its discretion in restricting the parties' voir dire of prospective jurors to fort-five minutes per party because the court conducted its own voir dire and had the jurors complete two questionnaires before imposing the time restriction.

D. The trial court did not commit plain error by declining to include in the interrogatories for unlawful sexual contact the exact language listed in section 18-3-402(4)(a)-(c), C.R.S. 2008, governing enhancement of the crime because (1) the omission of the statutory language explaining the terms "force," "intimidation," and "threat" was harmless, and (2) the definitions of "cause" and "compel" are nearly identical.

E. The trial court did not abuse its discretion by permitting the prosecution to interrupt the victim's direct examination to present an expert witness who allegedly bolstered the victim's testimony because the interruption did not deprive defendant of his right to effectively cross-examine the victim.

## II. FACTS

Defendant is a Saudi Arabian citizen who has resided in the United States since 1995. The victim is an Indonesian citizen who was brought to the U.S. by defendant to work for him and his family as a domestic servant. She worked for them from September 2000 until her arrest on immigration violations in November 2004.

While in custody for her alleged immigration violations, the victim told investigators that she had been repeatedly sexually assaulted by defendant. She also stated that defendant paid her only a fraction of the money to which she was entitled for working as his domestic servant. Defendant was arrested and charged with various crimes stemming from the victim's allegations.

## III. ANALYSIS

### A. Sufficiency of Evidence

Defendant contends that the evidence presented by the prosecution was insufficient as a matter of law to

support the jury's findings that he was guilty of theft and unlawful sexual contact. We disagree.

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the People, giving the People the benefit of every reasonable inference that might be drawn from the evidence. *People v. Howard,* 89 P.3d 441, 444 (Colo. App. 2003).

1. Theft

As relevant here, section 18-4-401(1)(a), C.R.S. 2008, provides:

> (1) A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:
> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value.

Defendant argues that the prosecution did not present sufficient evidence that (1) defendant exercised unauthorized control of the wages the victim earned while she was in the U.S., and (2) he intended to permanently deprive her of those wages.

a. Unauthorized Control

Exercising control over property "without authorization" means that the owner of the property has not given the defendant permission to exercise

control over it. *People v. Gracey*, 940 P.2d 1050, 1052 (Colo. App. 1996).

Here, the victim testified that she was told by the agency that arranged her employment with defendant's family that she would be paid 600 Saudi riyals once a month. According to the victim, she did not have a problem with defendant's family holding her wages for her, but she "just wanted them to send it [to her parents in Indonesia] when . . . requested" and she "would ask for help to please send th[e] money." She also testified, "[T]he issue of . . . holding my money is not a problem as long as they would have sent it to my parents, who need it," and "it is okay with me if they hold my money. But if I ask to send my money, they should send money."

The victim further testified that despite her repeated requests, defendant only sent $1,000 to her parents, and his wife only paid the victim $500. Yet $1,500 was only a fraction of the money the victim was owed. She also testified that she was promised that more money would be sent, but it never was; and, on two occasions, defendant falsely told the victim that money had been sent.

One of defendant's friends also testified that defendant stated that he sent the victim's compensation home to her parents in Indonesia every month or every other month. Furthermore, defendant's secretary and his wife's driver testified that defendant stated that he paid her $1,200 per month, which he sent to her family in Indonesia. The victim also testified that defendant instructed her to

tell authorities that he sent $ 800 per month to her parents in Indonesia, even though he did not do so.

Considering this evidence in the light most favorable to the prosecution, the jury could properly find that defendant was only authorized to hold the victim's wages until she asked that they be sent to her family in Indonesia and that defendant did not send the money when asked to do so. Accordingly, the evidence was sufficient to support the jury's finding that defendant held the victim's wages without authorization. *See Gracey*, 940 P.2d at 1052.

b. Intent to Permanently Deprive

An intent to permanently deprive another of his or her property may be inferred from a defendant's conduct and the circumstances of the case. *People v. Pedrie*, 727 P.2d 859, 862 (Colo. 1986).

Citing *People v. McClure*, 186 Colo. 274, 277, 526 P.2d 1323, 1324 (1974), defendant argues that he would have paid the victim her remaining wages at the end of her term of employment if not for his incarceration. Thus, he contends that he did not intend to permanently deprive her of her wages.

However, as discussed, the victim testified that despite her repeated requests, defendant only sent $1,000 to her parents, and his wife only paid the victim $500. Yet, because she worked for defendant's family seven days a week for roughly four years, except for periods when he sent her to work for others, she was entitled to far more money, which defendant

did not send. Moreover, although defendant claims that he and his wife kept written records accounting for the waves they were allegedly holding for the victim, he did not proffer any such records. Accordingly, the evidence was sufficient for the jury to find that defendant intended to permanently deprive the victim of the remaining money to which she was entitled. *See Pedrie*, 727 P.2d at 862.

2. Unlawful Sexual Contact

Defendant argues (1) that the evidence was insufficient to find him guilty of discrete acts of unlawful sexual contact, and (2) that the evidence supporting the count tied to the act of sexual intercourse did not correspond to the date range provided in the information and thus must be vacated. We conclude that the evidence was sufficient to support the jury's verdict finding defendant guilty of unlawful sexual contact. However, we do not address defendant's argument that the sexual intercourse verdict form did not correspond to the dates listed in the information because defendant did not present this argument in his opening appellate brief.

The prosecution charged defendant with twelve counts of sexual assault. The information did not specify any particular acts, but included dates for the alleged sexual assaults: eleven of the sexual assault charges were listed as having occurred between October 1, 2003 and November 30, 2004 and one was listed as having occurred between October 1, 2002 and September 30, 2003.

The verdict forms differentiated eleven counts on the basis of the month in which they were committed (*i.e.*, consecutive months from November 2003 to May 2004 and consecutive months from August 2004 to November 2004). The remaining count was differentiated on the basis of the nature of the count (*i.e.*, sexual intercourse), but did not include a date.

At defendant's request, the verdict forms included the lesser included offense of misdemeanor unlawful sexual contact for each sexual assault count. The jury was also given a general unanimity instruction.

The jury found defendant guilty of twelve counts of unlawful sexual contact.

a. Sufficiency of Evidence

As relevant here, section 18-3-404(1)(a), C.R.S. 2008, provides,

> (1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:
> (a) The actor knows that the victim does not consent.

"Sexual contact" is defined as

> the knowing touching of the victim's intimate parts by the actor, or the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual

> contact is for the purposes of sexual arousal, gratification, or abuse.

§ 18-3-401(4), C.R.S. 2008. "Intimate parts" is defined as

> the external genitalia or the perineum or the anus of the buttocks or the pubes or the breast of any person.

§ 18-3-401(2), C.R.S. 2008.

Here, the victim testified that defendant began touching her sexually against her will three months after she came to the U.S. with his family. This occurred approximately between November 2000 and January 2001. She testified that the unwanted sexual contact occurred approximately once every two weeks while she and defendant's family lived in the "first house."

The victim further testified that, while living in the first house, the unwanted sexual contact included defendant removing her clothes, kissing her breasts, digitally penetrating her vagina, and rubbing his penis against her vagina. Despite the victim's verbal and physical resistance to defendant's unwanted sexual contact, defendant accomplished the unwanted contact by forcibly holding down her arms and body and, at times, holding her hair.

The victim also testified that the unwanted sexual contacts increased in frequency and severity when they moved to the "second house" in the summer of

2003. About once a week, usually on Friday nights, defendant would go to the victim's room in the basement and digitally penetrate her, or force her to perform oral sex by pushing his penis in her mouth, which the victim estimated occurred more than ten times.

The victim testified that the last incident of unwanted sexual contact occurred approximately two weeks before November 18, 2004, which was the date she was taken from defendant's house. In that incident, defendant, for the first time, had sexual intercourse with the victim, who was a virgin at the time.

The evidence was sufficient for the jury to find that defendant committed eleven acts of unlawful sexual contact that were tied to the months of November 2003 to November 2004, as listed on the jury verdict forms. *See Howard*, 89 P.3d at 444. The evidence was also sufficient for the jury to find that defendant committed the act of unlawful sexual contact that, in the jury verdict form, was tied to the act of sexual intercourse. *See id.*

b. Count Tied to the Act of Sexual Intercourse

Defendant argues that the evidence was not sufficient to support the jury verdict finding him guilty of the count of unlawful sexual contact tied to the act of sexual intercourse because there was no evidence that any sexual intercourse occurred between October 1, 2003 and November 30, 2004, the dates listed on the

information. However, because defendant did not raise this argument in his opening appellate brief, we do not address it. *See Casserly v. State*, 844 P.2d 1275, 1278 (Colo. App. 1992) (appellate court only addresses issues raised in appellant's opening brief).

B. Challenges for Cause

Defendant contends that the trial court erred in denying the challenges for cause he asserted based on alleged actual bias of three prospective jurors. We disagree because the prospective jurors did not evince actual bias toward defendant.

A trial court's denial of a challenge for cause is reviewed for an abuse of discretion, which is "a very high standard" that gives deference to the trial court's assessment of the credibility of a prospective juror's responses, "recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses," and "serves to discourage an appellate court from second-guessing those judgments based on a cold record." *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999).

Section 16-10-103, C.R.S. 2008, delineates when a trial court must sustain a challenge for cause. As relevant here, the provision governing "actual bias," section 16-10-103(1)(j), provides:

> (1) The court shall sustain a challenge for cause on one or more of the following grounds:
>
> . . .

> (j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

Thus, actual bias is a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000).

1. Juror C.M.

Defendant argues that the trial court erred in denying his challenge for cause of Juror C.M. based on the juror's actual bias toward defendant because he was Muslim and the juror's statement that he had a friend, relative, or acquaintance who had been the victim of sexual assault. However, the record does not indicate that Juror C.M. evinced actual bias toward defendant.

According to his questionnaire, Juror C.M. was scheduled to go on a business trip to Mexico the following week, which could not be rearranged without some inconvenience and possible expense. He also indicated that he had a "friend, relative, or

acquaintance" who had been a victim of sexual assault and that he had no reaction to the fact that the case involved Muslims. And, during voir dire, he did not express any prejudice relating to Islam or issues of sexual assault.

After Juror C.M. was selected to serve on the jury, defendant noted that Juror C.M. "appears somewhat agitated" and asked the court to excuse him for cause because of hardship related to his upcoming business trip. The prosecution objected, and the court denied defendant's request.

As the court began administering the oath to the jury, Juror C.M. interrupted the process, stating:

> Before I take this oath, can I ask a question that I didn't address previously because I was under the impression that really wouldn't matter. But with respect to the religious issue that has come to light in this, it appears what comes to light in what would be this trial, if I'm more likely to believe a person of faith would commit a crime if it conflicted — if the faith conflicted with the laws of our government. It being said that the Muslim religion will be at issue here, it is my understanding that the laws of God are higher than the laws of man. Would it be a bias that I have or would that be consistent with the Muslim religion? [sic]

The court responded by reminding Juror C.M. that his obligation, which "would be [his] sworn duty to carry

out," was to base his decision on the evidence presented and on legal principles given by the court.

Juror C.M. then stated: "What I say, notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the believe he would be obeying religion versus law." [sic] The court again explained the principle of deciding cases based on the evidence and applying the law as given by the court.

Juror C.M. responded, "I guess I'm presenting you what I may or may not have a bias going into this case, and I just don't know if that would be considered bias or that would be considered factually consistent with religion that may be at hand here." The court responded by stating that, while it could not get into specific facts or issues that might come up in the case, based on Juror C.M.'s previous indication that he could follow the law and base his decision on the evidence presented, he was qualified as a juror in this case. Juror C.M. then said, "okay."

Defendant subsequently asked the court to excuse Juror C.M. for cause or allow "extended" voir dire, which the court denied.

After the court administered the oath to the jury, the following exchange occurred:

| | |
|---|---|
| COURT: | Mr. [C.M.], did you say I do? |
| JUROR C.M. | Yeah, I guess. |
| COURT: | Did you say I do, sir? |
| JUROR C.M.: | I do. |

Defendant then made the following record regarding Juror C.M.'s body language during the exchange: that Juror C.M. did not initially respond to the court, that the court addressed him in a raised voice, that he shook his head either in disgust or disagreement, and that he said yes while shaking his head.

The court responded to defendant's characterization:

> For the record in that regard . . . when I was administering the oath to the jury, I didn't see Mr. [C.M.], who seemed to be showing some discomfort about serving on the jury, state that he was taking the oath. And when I asked him the first time, he shook his head and I took it in the affirmative. But I again asked him mainly because I wasn't certain he heard me the first time to indicate whether he was taking the oath. And I said, "Do you take this oath?" And, in effect, he acknowledged that he was. If any further matters arise during the trial concerning Mr. [C.M.], we certainly can address those at a later time, and that completes the court's record on this matter.

Based on these statements and exchanges, two points emerge. First, prior to his selection, Juror C.M. did not evince any concerns of bias toward defendant or the Islamic religion. His questionnaire indicated that he had no reaction to the fact that people involved in the case were Muslim. Moreover, defendant expressed no concerns when the issue was raised of

whether people from other cultures living in the U.S. should obey the laws of this country.

Second, after his selection, Juror C.M.'s comments did not unequivocally express actual bias against defendant or his religion. *See Carrillo*, 974 P.2d at 488. Instead, he inquired of the court whether it would be considered bias if he believed that a person of faith would commit a crime if that faith conflicted with the laws of the government. Moreover, in his final statement to the court, he said, "I just don't know if that would be considered bias or that would be considered factually consistent with the religion that may be at hand here." Thus, Juror C.M. was simply asking for clarification, and was not evincing a bias against defendant or his religion that would require rehabilitation. *Cf. People v. Russo*, 713 P.2d 356, 362 (Colo. 1986) (juror who expresses actual bias must be rehabilitated by subsequent examination such that the juror indicates that his original statement of actual bias was the result of mistake, confusion, or some other factor that will have no effect whatsoever on the juror's ability to render a fair and impartial verdict).

Accordingly, the trial court did not abuse its discretion in denying defendant's challenge for cause and his request for extended voir dire. *See Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000) (trial court's ruling on challenge for cause is entitled to great deference "because such decisions turn on an assessment of the juror's credibility, demeanor, and sincerity in explaining his or her state of mind"); *Carrillo*, 974 P.2d at 488 ("although it would have been better practice fo the trial judge to question [the

juror] in order to fully explore his feelings," the juror's answers taken as a whole did not demonstrate actual bias).

2. Prospective Jurors P.B. and J.J.

We also disagree with defendant's argument that the trial court erred in denying his challenges for cause as to Prospective Jurors P.B. and J.J. because they both had indicated on their questionnaires that they had been sexually assaulted in the past. Like Juror C.M., neither P.O. nor J.J. evinced actual bias.

In her juror questionnaire, Prospective Juror P.B., age fifty-two, disclosed that she had been sexually assaulted at age twenty-three, that her daughter had been sexually abused by her stepfather at age six, and that her granddaughter had been sexually assaulted at age two or three. Prospective Juror J.J., age fifty-four, disclosed in her questionnaire that she had been sexually assaulted at age twenty-five. She also indicated that a friend, relative, or acquaintance had been sexually assaulted as well.

During the court's voir dire, neither prospective juror expressed concern regarding her ability to remain impartial. Moreover, defendant did not question either juror during voir dire despite their stated willingness to discuss their experiences in open court. Defendant nonetheless challenged both prospective jurors for cause because they had been victims of sexual assault, and he requested additional time to question them individually.

The trial court denied the challenges, noting that neither of them had indicated a difficulty with being fair and impartial when the court addressed the panel about that issue. The court further ruled that it would not infer bias simply because they had been victims of sexual assault in the past. Thereafter, defendant exercised peremptory challenges against Prospective Jurors P.B. and J.J.

A prospective juror who is a victim of sexual assault is not presumed to be biased against a defendant accused of sexual assault. *See People v. Arko*, 159 P.3d 713, 722 (Colo. App. 2006) ("The fact that a prospective juror has been the victim of a crime, even one similar to that with which the defendant is charged, does not automatically require that the prospective juror be disqualified from serving on the jury."), *rev'd on other grounds*, 183 P.3d 555 (Colo. 2008). Rather, such a prospective juror must evince actual bias, which is a state of mind that prevents a juror from deciding a case impartially and without prejudice to a substantial right of one of the parties. *People v. Ellis*, 148 P.3d 205, 208 (Colo. App. 2006); *cf. People v. Luman*, 994 P.2d 432, 435 (Colo. App. 1999) (prospective juror who was a victim of sexual assault and worked as a sexual assault counselor evinced actual bias by expressly indicating that her personal, professional, and family history and experience with sexual assault would make it difficult, if not impossible, to view the evidence in an objective and unbiased manner).

Here, Prospective Jurors P.B. and J.J., as well as Juror C.M., did not evince actual bias or enmity

toward defendant. Accordingly, the trial court did not err in denying defendant's challenges for cause. *See Arko*, 159 P.3d at 722.

C. Voir Dire Time Limit

Defendant contends that the trial court abused its discretion in restricting the parties' voir dire or prospective jurors to forty-five minutes per party. We disagree because the trial court conducted its own voir dire and had the prospective jurors answer a general and case-specific questionnaires that addressed potential biases, all before the court determined the amount of time it would allow the parties to make decisions regarding juror challenges.

The right to examine prospective jurors through the voir dire process is not constitutional. *People v. Evans*, 987 P.2d 845, 847 (Colo. App. 1998), *overruled in part by Lefebre*, 5 P.3d at 302 n.5. Rather, the right is governed by Crim. P. 24, which states: "In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination." Crim. P. 24(a)(3). Thus, although the rule permits parties or their counsel to examine potential jurors, "the trial judge can limit the extent and the nature of the questioning," *Lefebre*, 5 P.3d at 301, "[s]o long as the voir dire examination is conducted in a manner that will facilitate an intelligent exercise of challenges for cause and peremptory challenges." *People v. Rudnick*, 878 P.2d 16, 21 (Colo. App. 1993).

Trial courts are vested with broad discretion in determining the process by which voir dire will be conducted. *People v. Harlan*, 8 P.3d 448, 462 (Colo. 2000). Specifically, trial courts have considerable discretion to limit the length of questioning and its nature. *People v. Reaud*, 821 P.2d 870, 871 (Colo. App. 1991). "[A] restriction upon voir dire examination by counsel will be considered to be reversible error only if the court abuses its discretion with a prejudicial result." *Id.*

Here, before the parties' voir dire, the court required the prospective jurors to complete two questionnaires that asked the jurors' feelings on issues specifically relating to the case. For example, one question provided: "The defendant, the complaining witness, and other witnesses in this case are Muslims from the Middle East and Indonesia. Please briefly give your reaction to that fact." Another question asked: "Do you believe there is any reason why you cannot be a fair and impartial juror? If yes, please give your reasons."

After the prospective jurors completed the questionnaires, the court questioned the entire panel on the issue of hardship. The court then took a recess, giving the parties an opportunity to review the questionnaires in more detail to prepare their voir dire. Following the recess, the court questioned the prospective jurors on their ability to decide the case strictly based on the evidence presented at trial and the law provided by the court. Eight prospective jurors expressed concern about their impartiality based on pretrial publicity, familiarity with the case against

defendant's wife, personal life experiences, or circumstances of the alleged crime.

The court then asked:

> We've addressed a number of matters pertaining to your personal and business affairs, and I'm wondering if there is any other reason that you can think of at this time why if you were selected as a juror you could not or would not be fair and impartial in deciding this case? Is there anything else along those lines? Because that's [sic] a very important function of jury selection is we select jurors who will be completely fair and open-minded and impartial.

Other than the eight prospective jurors mentioned above — each of whom was eventually excused — no further jurors indicated a concern about being impartial.

Then, after noting, "We already have a good deal of information about you from your questionnaires and from the questioning that I've conducted of you this morning and early afternoon," the court determined that forty-five minutes per party was an adequate amount of time to question the ninety-seven jurors.

In light of the case-specific and general questionnaires used to gather information about the prospective jurors' biases, as well as the court's own voir dire questions that further sought to ferret out such biases, the court did not abuse its discretion by limiting the parties' voir dire to forty-five minutes per

side. *See Rudnick*, 878 P.2d at 21 (in a murder case, no abuse of discretion for court to limit voir dire to ninety minutes per party when court had conducted extensive voir dire beforehand and permitted in camera discussions with several prospective jurors); *People v. Rodriguez*, 786 P.2d 472, 473-74 (Colo. App. 1989) (in a murder case where prosecution was seeking death penalty, no abuse of discretion for court to limit voir dire to fifty minutes per group of fifteen jurors and fifty minutes for the remaining panel, when entire voir dire took four days); *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984) (in theft case, no abuse of discretion where defense counsel's voir dire was cut off after twenty-eight minutes of questioning), *aff'd*, 716 P.2d 1111 (Colo. 1986); *People v. Heller*, 698 P.2d 1357, 1361 (Colo. App. 1984) (in securities fraud case, no abuse of discretion for court to permit three defendants only one hour total to conduct voir dire where court had conducted its own extensive voir dire beforehand), *rev'd on other grounds*, 712 P.2d 1023 (Colo. 1986).

D. Interrogatory Language

Defendant contends that the trial court committed plain error by failing to include in the interrogatories for the unlawful sexual contact charges the exact language listed in section 18-3-404(4)(1)-(c) governing enhancement of the crime from a class 1 misdemeanor to a class 4 felony. We disagree because any such error was not plain error.

Where, as here, a defendant fails to object to a jury instruction before the instruction is given to the jury,

we review only for plain error. *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005). Plain errors are those errors that "so undermined the fundamental fairness of the trial itself . . . as to cast serious doubt on the reliability of the judgment of conviction." *Id.* at 750 (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003)). In the context of an unpreserved claim of instructional error, the defendant bears the burden of demonstrating "not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction." *Id.* (quoting *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)).

Here, the jury instruction for the charges of unlawful sexual contact included an interrogatory that, if answered affirmatively, would enhance the crime from a class 1 misdemeanor to a class 4 felony. The interrogatory asked the jury whether it "unanimously f[ou]nd, beyond a reasonable doubt, that the defendant did *cause* submission of [the victim] by the use of *force, intimidation, or threat*" (emphasis added). The jury responded affirmatively to each such interrogatory.

Defendant, however, notes that section 18-3-404(2)(b), C.R.S. 2008, which outlines the enhancement of the crime of unlawful sexual contact, provides in relevant part: "unlawful sexual contact is a class 4 felony if the actor *compels* the victim to submit by use of such *force, intimidation*, or *threat as specified in section 18-3-402(4)(a), or (4)(c)*" (emphasis added). Section 18-3-402(4)(a)-(c), in turn, provide:

> (a) The actor causes submission of the victim through the actual application of physical force or physical violence; or
> (b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or
> (c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain.

Thus, defendant argues that the language used in the interrogatories constituted plain error because: (1) the interrogatories failed to include the statutory language of section 18-3-402(4)(a)-(c), which is narrower than the common understanding of the terms "force," "intimidation," and "threat"; and (2) it used the term "cause" instead of "compel," as is contained in section 18-3-404(2)(b).

1. Force, Intimidation, and Threat

In defendant's view, the jury could have answered affirmatively to the "force, intimidation, or threat" question based on its common understanding of the terms without finding that defendant achieved the unlawful sexual contact by means of the conduct specified in section 18-3-402(4)(a)-(c).

However, whether the common definitions of the terms "force," "threat," and "intimidation" are broader than the language in section 18-3-402(4)(a)-(c) is not relevant here because the victim testified that defendant accomplished his unlawful sexual contacts by means of applying physical force (e.g., holding her arms down), which accords with the language of section 18-3-402(4)(a) ("The actor causes submission of the victim through the actual application of physical force or physical violence.").

Thus, although the victim also testified that she was "afraid to go outside" because of her illegal immigration status, and that she did not alert defendant's wife to the sexual contacts because she was "afraid" the wife would be angry, she did not testify that those fears or other threats made by defendant or his family were the means by which he accomplished the unlawful sexual contacts. Therefore, the evidence does not indicate that he accomplished his unlawful sexual contacts by threats or intimidation (either as commonly understood or as set forth in section 18-3-402(4)(b)-(c)), or by force other than physical force.

Consequently, any error in failing to include the language of section 18-3-402(4)(a)-(c) was not plain error. *See People v. Villareal*, 131 P.3d 1119, 1129 (Colo. App. 2005) (instructional error that could not have affected the jury verdict was harmless and was not a plain error). Likewise, the verdict forms' inclusion of intimidation and threats as alternative

theories of liability was not plain error. *See People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004).

2. Cause or Compel

Defendant further asserts that the trial court committed plain error by using the word "cause" in the interrogatories, rather than the word "compel." However, any such effort is not plain because the terms' commonly understood meanings are nearly identical. *Compare Webster's Third New International Dictionary 356* (2002) (defining "case" as (1) "to serve as a cause or occasion of : bring into existence : make," and (2) to effect by command, authority, or force"), *with id.* at 463 (providing nine definitions of "compel," seven of which involve the term "force").

Moreover, we reject defendant's argument that the legislative history of the crimes of first, second, and third degree sexual assault demonstrates that "case" and "compel" were intended to have different meanings. According to defendant, the words "cause" and "compel" were first used in 1975 when the General Assembly created first, second, and third degree sexual assault. First and second degree sexual assault required the actor to "cause" submission. Third degree sexual assault (the predecessor to the current unlawful sexual contact offense) required the actor to "subject" a victim to sexual contact and permitted enhancement if the actor "compel[led]" the victim to submit.

However, contrary to defendant's assertion, the legislative history demonstrates only that the General

Assembly intended "compel" to be more severe than "subject." It does not indicate that the General Assembly intended "compel" to be more severe than "cause."

E. Order of Prosecution Witnesses

Defendant contends that the trial court abused its discretion by permitting the prosecution to interrupt the victim's direct examination to present an expert witness who bolstered the victim's testimony. He claims that the interruption violated his Confrontation Clause right to cross-examine the victim effectively. We disagree.

A trial court has discretion to exercise reasonable control over the interrogation of witnesses and the presentation of evidence. CRE 611; *People v. Whitman*, ___P.3d ___, ____ (Colo. App. No. 04CA1428, Nov. 29, 2007). Absent an abuse of discretion, a trial court's rulings will not be disturbed on review. *People v. Caldwell*, 43 P.3d 663, 670 (Colo. App. 2001); *Whitman*, ___ P.3d at ___. Moreover, whether a defendant's rights under the Confrontation Clause have been violated is an issue of law we review de novo. *People v. Villano*, 181 P.3d 1225, 1229 (Colo. App. 2008).

Here, because the victim's testimony was taking much longer than anticipated due to the need for translation, the prosecution requested that five out-of-state witnesses (including an expert witness) be allowed to testify as scheduled the following day, the only day they were available.

Defendant objected to the expert witness testifying before the victim's cross-examination, but the trial court, noting its "discretion in terms of regulating the presentation of evidence under the rules of evidence," permitted the out-of-state witnesses to testify the following day as scheduled.

Although defendant argues that he was denied his right to meaningfully cross-examine the victim because her testimony was interrupted by a credibility-bolstering witness, any such bolstering (if there were any) would have occurred regardless of its timing. Moreover, defendant conceded that the prosecution could have called the expert to testify before the victim. These circumstances demonstrate that the timing of the expert's testimony was not prejudicial, especially considering that defendant was able to fully cross-examine both the expert and the victim on all aspects of their testimony. *Cf. People v. Cevallos-Acosta*, 140 P.3d 116, 127 (Colo. App. 2005) (a defendant's confrontation right is violated when he or she is prevented from cross-examining evidence bearing on credibility).

Thus, the interruption of the victim's testimony did not violate defendant's confrontation right to cross-examine her. *See Fensterer*, 474 U.S. at 20 ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

Moreover, the trial court's decision to permit the interruption in the victim's testimony based on the schedules of out-of-state witnesses, which is a reasonable and not arbitrary ground, was not an abuse of its discretion. *See Whitman*, ___ P.3d at ___.

The judgments of conviction are affirmed.

JUDGE TERRY and JUDGE MÁRQUEZ concur.

## APPENDIX B

Supreme Court of Colorado,
En Banc.

Homaidan AL-TURKI, Petitioner,

v.

The PEOPLE of the State of Colorado, Respondent.

No. 09SC326.

Sept. 14, 2009.

Court of Appeals Case No. 06CA2104.
Petition for Writ of Certiorari DENIED.

JUSTICE MARTINEZ would grant as to the following issues:

Whether the court of appeals erred in this highly publicized prosecution of a Muslim defendant by requiring that a juror "unequivocally" express actual bias against the defendant as a precondition for permitting additional questioning of the juror or excusal for cause, where a juror clearly expressed a potential bias against the defendant based on the defendant's religion and the trial court refused to permit further questioning regarding the bias.

Whether, in deciding whether no reasonable possibility exists that a plainly erroneous special interrogatory contributed to the defendant's conviction

for multiple enhanced, lifetime prison sentences, the court of appeals applied a type of plain error review not in accord with the court's decisions by (i) limiting its review to the complaining witness's testimony and (ii) excluding from consideration substantial record evidence on which the jury impermissibly could have relied to make its enhancement finding.